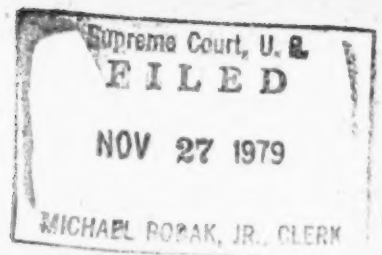


No. 79-525



In the Supreme Court of the United States

OCTOBER TERM, 1979

JEANENE MOENCKMEIER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-525

JEANENE MOENCKMEIER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION**

Petitioner seeks review of an order enforcing an Internal Revenue summons directing a bank to produce its business records relating to her accounts with the bank. Petitioner contends that the district court erred in denying her an evidentiary hearing and discovery to explore the question whether the summons was issued in good faith.

The pertinent facts may be summarized as follows: As part of his investigation of petitioner's income tax liabilities, Special Agent Nelson H. Patnaude of the Criminal Investigation Division, Internal Revenue Service, issued a summons directing the Midlantic National Bank to produce its records of all accounts and financial transactions involving petitioner. Pursuant to Section 7609 of the Internal Revenue Code of 1954 (26

U.S.C.), petitioner directed the bank to refuse to comply with the summons. Thereupon, the United States and Agent Patnaude instituted the present action in the United States District Court for the District of New Jersey to compel compliance with the summons (Pet. App. A-9).

The affidavit accompanying the petition seeking enforcement of the summons, and a supplemental affidavit of Agent Patnaude, stated that the purpose of the investigation was to ascertain petitioner's correct income tax liabilities for the years under investigation; that the records sought were relevant to that investigation; that the information sought was not already in the Internal Revenue Service's possession; that the Service had made no recommendation to the Department of Justice regarding possible prosecution of petitioner; that the summons was not issued at the request of the Department of Justice; and that all administrative steps required by the Internal Revenue Code had been followed. At a hearing, the district court ordered the agent to file another affidavit addressing petitioner's "suspicion" that the summons was being used to feed information to an unrelated criminal investigation of possible customs violations. Upon receipt of that affidavit denying that the summons had been issued at the request of any employee of the Justice Department or of the Customs Service, the district court ordered the summons enforced (Pet. App. A-4 to A-5). The court of appeals affirmed (Pet. App. A-1 to A-2).

1. The decision below correctly enforced the summons directing production of third-party bank records regarding petitioner's financial transactions. This Court has uniformly held that the government need make only a prima facie showing that it is entitled to enforcement of

an Internal Revenue summons and that such a showing shifts to the party opposing enforcement the burden of proving that enforcement would be an abuse of the court's process. See, e.g., *United States v. Powell*, 379 U.S. 48 (1964); *Donaldson v. United States*, 400 U.S. 517 (1971); *United States v. LaSalle National Bank*, 437 U.S. 298 (1978).

It is likewise settled that a party challenging a summons is not entitled to an evidentiary hearing in a summons enforcement proceeding unless he alleges specific facts that would establish a defense to enforcement and supports them by affidavit. *United States v. Garden State National Bank*, 79-2 U.S.T.C. para. 9632 (3d Cir. Oct. 10, 1979); *United States v. McCarthy*, 514 F. 2d 368 (3d Cir. 1975).¹ Here, although petitioner made several bare allegations, she did not present any facts in her affidavit to counter the government's prima facie showing that it was entitled to enforcement.² With only conclusory allegations of bad faith and the absence of any facts to support those allegations, the district court's enforcement of the summons without either an eviden-

¹The procedure approved by the court of appeals is consistent with those adopted by other circuits for summons enforcement proceedings. See *United States v. Salter*, 432 F. 2d 697 (1st Cir. 1970); *United States v. Morgan Guaranty Trust Co.*, 572 F. 2d 36 (2d Cir.), cert. denied, 439 U.S. 822 (1978); *United States v. McGuirt*, 588 F. 2d 419 (4th Cir. 1978), cert. denied, (Oct. 1, 1979 No. 78-1607); *United States v. Church of Scientology of California*, 520 F. 2d 818 (9th Cir. 1975).

²Petitioner's primary defense to the summons—that the summons was the product of an illegal wiretap—had been rejected in another summons enforcement proceeding (*United States v. Landmark Bank of Orlando*, (No. 78-74-ORL-CIV-R) (M.D. Fla. Mar. 22, 1978), aff'd, No. 78-1838 (5th Cir. Nov. 13, 1978), cert. denied, No. 78-1210 (Apr. 16, 1979). She abandoned that claim in the court of appeals.

tiary hearing or discovery was entirely proper. *United States v. Moll*, 602 F. 2d 134 (7th Cir. 1979); *United States v. Morgan Guaranty Trust Co.*, 572 F. 2d 36 (2d Cir.), cert. denied, 439 U.S. 822 (1978); *United States v. Newman*, 441 F. 2d 165 (5th Cir. 1971).

2. Contrary to petitioner's contention (Pet. 17-22), the decision below does not conflict with *United States v. Salter*, 432 F. 2d 697 (1st Cir. 1970); *United States v. Garrett*, 571 F. 2d 1323 (5th Cir. 1978); *United States v. Turner*, 480 F. 2d 272 (7th Cir. 1973); or *United States v. Wright Motor Co.*, 536 F. 2d 1090 (5th Cir. 1976). In *Salter*, the court specifically held that a person challenging a summons is not entitled to discovery unless he presents at least "some evidence" of an improper purpose justifying further inquiry (432 F. 2d at 700). Both *Wright Motor* and *Turner* turn simply on the propriety of the district court's exercise of its discretion in granting or denying discovery.

Finally, in *Garrett*, the court's conclusion that discovery was warranted was based on its express determination that the taxpayer had, in fact, "adequately placed the purpose of the IRS in issue and alleged circumstances under which the purpose would bear upon the legality of the summons[es]" (571 F. 2d at 1326). None of these cases held that such a person is entitled to either discovery or a hearing in the absence of such specific allegations. Indeed, the courts of appeals that have addressed the question whether there is a necessity for a hearing have uniformly held that none is required if the party challenging the summons does not, in his answer to the petition or show cause order, establish the existence of a disputed factual issue. Mere conclusory allegations of improper purpose are insufficient. See, e.g., *United States v. Garden State National Bank*, *supra*, 79-2 U.S.T.C. para. 9632 at p. 88,297; *United*

States v. Noall, 587 F. 2d 123 (2d Cir. 1978); *United States v. McGuirt*, 588 F. 2d 419 (4th Cir. 1978), cert. denied, No. 78-1607 (Oct. 1, 1979); *United States v. Church of Scientology*, 520 F. 2d 818 (9th Cir. 1975).

3. Finally, petitioner argues (Pet. 23-26) that the government had the burden of showing the institutional good faith of the Internal Revenue Service in conducting its investigation. But this Court has held that the party challenging the summons has the burden of proving that the summons was issued for an improper purpose (*United States v. Powell*, *supra*), including the burden of disproving the actual existence of a valid civil tax determination or collection purpose by the Service (*United States v. LaSalle National Bank*, *supra*, 437 U.S. at 316). Petitioner, however, failed to allege any facts that would, if proved, have met the burden.³

Moreover, an examination of the institutional posture of the Internal Revenue Service was unnecessary in this case. As the Court pointed out in *United States v. LaSalle National Bank*, *supra*, 437 U.S. at 314-317, the critical inquiry is whether the Internal Revenue Service has abandoned its institutional responsibility to collect taxes and civil fraud penalties. Where, as here, an agent's sworn statements that he was in fact pursuing an investigation to determine civil tax liability and had issued the summons for that purpose are uncontradicted, there is no issue as to institutional bad faith that would necessitate either a hearing or discovery.

³The single allegation of petitioner, based solely on her suspicion, which concerned the district court, was the subject of a post-hearing affidavit by the agent, and the petitioner did not counter that affidavit. Such post-hearing affidavits are an appropriate substitute for an evidentiary hearing on a point with respect to which the district court believes some explanation is warranted. *United States v. Marine Midland Bank*, 585 F. 2d 36, 38-39 (2d Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979